Supreme Court, U.S.
FILED
JUN 6 1997
OFFICE OF THE CLERK

No. 96-1778

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1996

In re ELLIOTT ABRAMS, ESQUIRE

On Petition for a Writ of Certiorari
to the District of Columbia Court of Appeals

BRIEF FOR OFFICE OF BAR COUNSEL IN OPPOSITION

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18 pp

QUESTION PRESENTED

Whether the District of Columbia Court of Appeals correctly imposed a public censure of Petitioner, notwithstanding his presidential pardon for criminal offenses, based upon his dishonest conduct in testifying falsely on three occasions before Committees of Congress.

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BRIEF FOR OFFICE OF BAR COUNSEL IN OPPOSITION

The opinion of the District of Columbia Court of Appeals, imposing a public censure of Petitioner (Pet. App. 1a), is reported at 689 A.2d 6 (D.C. 1997).

JURISDICTION

The judgment of the court of appeals for which review is sought was entered February 5, 1997. Petitioner filed a petition for writ of certiorari on May 6, 1997.

STATUTE AND RULES

The pertinent statute conferring jurisdiction on the court of appeals to discipline members of its Bar and relevant rules of professional conduct prescribed by the court are set out in an Appendix to this brief.

STATEMENT OF PROCEEDINGS BELOW

Petitioner, a member of the District of Columbia Bar, served as Assistant Secretary of State for Inter-American Affairs in the Reagan Administration.[1] In three appearances before Congressional committees in 1986, he testified falsely concerning his knowledge of the government's efforts to arrange third-party support for the Nicaraguan Contras. On October 10, 1986, when asked about the nature and extent of such efforts, Mr. Abrams told the Senate Committee on Foreign Relations that "we have been kind of careful not to get closely involved with it and to stay away from it"; that "we do not encourage people to [provide aid to the Contras], . . . we don't have conversations, we don't tell them to do this, we don't ask them to do it"; and that such assistance as might be provided by others was "without any encouragement or coordination from us, other than a public speech by the President, that kind of thing, on the public record." 689 A.2d at 8 (Pet. App. 5a). That testimony was false, because Mr. Abrams knew that Lt. Col. Oliver North had been in contact with suppliers to the Contras and that Col. North had encouraged such activity. Moreover, Mr. Abrams had met with a representative of the Sultan of Brunei in London in August 1986 -- two months before his Congressional testimony -- to request a $10 million contribution to the Contras, had been informed in mid-September 1986 that the Sultan had agreed to make the contribution, and had been told at the end of September 1986 -- about two weeks before his Congressional testimony -- that the contribution had been forwarded to a numbered Swiss bank account. *Id.*

On October 14, 1986, in an appearance before the House Intelligence Committee, Mr. Abrams was asked by the Committee Chair whether he knew if any foreign government had helped to supply the Contras. Mr. Abrams responded that

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[1] Petitioner is referred to as "Respondent" throughout the proceedings below. To avoid confusion, we refer to him by name in this brief in opposition.

for the period 1985-86, during his tenure at the State Department, the report of such assistance was false concerning both the Saudi and other governments. 689 A.2d at 8 (Pet. App. 6a). This testimony likewise was false because, as noted above, Mr. Abrams recently had solicited a multi-million dollar contribution from the Sultan of Brunei and had just been advised that the contribution had been deposited in a Swiss bank account in favor of the Contras. *Id.;* R. 14, at 24-25 (hearing committee report).

On November 25, 1986 -- the day that Attorney General Meese disclosed the Iran-Contra matter at a press conference -- Mr. Abrams appeared before the Senate Select Committee on Intelligence, where Senator Bradley asked him a series of questions concerning the Administration's financial aid to the Contras. Mr. Abrams testified: "I was, until today, fairly confident that there was no foreign government contribution to this. But I knew nothing, still don't know anything about the mechanisms by which money was transferred from private groups that have been raising it, to the Contras." 689 A.2d at 8 (Pet. App. 7a). Mr. Abrams' statement that he did not believe that foreign governments had contributed to such support was false, because he personally knew that the Sultan of Brunei had agreed to contribute $10 million and, so far as Mr. Abrams was aware, had done so. Mr. Abrams' further volunteered statement that he did not know about the transfer mechanisms from private groups also was false, as the hearing committee subsequently determined. *Id.* n.4.

Thereafter, Mr. Abrams came under investigation by the Independent Counsel appointed to investigate the Iran-Contra affair. In October 1991, Mr. Abrams pleaded guilty in the United States District Court for the District of Columbia to a two-count information charging misdemeanor violations of 2 U.S.C. § 192, relating respectively to the first and second Congressional appearances described above. 689 A.2d at 9 (Pet. App. 7-8a).[2]

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[2] Section 192 provides pertinently:

Pursuant to the rules of the District of Columbia Court of Appeals governing the Bar, Bar Counsel reported Mr. Abrams' criminal conviction to the court of appeals, which referred the matter to the Board on Professional Responsibility to recommend appropriate professional discipline. The Board in turn referred the matter to a hearing committee. Bar Counsel filed a three-count petition for discipline against Mr. Abrams, charging that each of the three testimonial episodes described above had given rise to a violation of Disciplinary Rule ("DR") 1-102(A)(4) of the Code of Professional Responsibility (the "Code").[3] The hearing committee received Mr. Abrams' testimony and relevant exhibits in a formal proceeding.

On December 24, 1992, while the disciplinary matter was pending decision before the hearing committee, President Bush extended a "full, complete and unconditional pardon" to Mr. Abrams, among others, relating to all offenses charged by the Independent Counsel or that might have been charged by him. 689 A.2d at 9 (Pet. App. 8a). On April 8, 1993, the hearing committee issued its report, finding that Mr. Abrams had violated DR 1-102(A)(4) on each of the three occasions, as charged, and recommending that he be suspended from the practice of law for one year. 689 A.2d at 9 (Pet. App. 9a). The committee concluded that the pardon did not preclude the imposition of professional discipline. Mr. Abrams took an exception before the Board, where he conceded that the pardon did not bar the imposition of discipline. However, when the Board issued its report on July 26, 1993, upholding

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> "Every person who having been summoned as a witness by the authority of either House of Congress to give testimony . . . upon any matter under inquiry before either House . . . or any committee of either House of Congress . . . refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor . . . ."

[3] DR 1-102(A)(4) provided: "A lawyer shall not . . . engage in conduct involving dishonesty, fraud, deceit, or misrepresentation." The Code applied in the District of Columbia to conduct occurring before January 1, 1991. After that date, the Code was superseded by the District's version of the Rules of Professional Conduct.

the hearing committee's report and recommendation, Mr. Abrams took a further exception to the court of appeals, contending that the pardon did foreclose the imposition of sanction. *Id.*

On July 10, 1996, a three-judge panel of the court of appeals sustained Mr. Abrams' contention that the Presidential pardon foreclosed the imposition of professional discipline, vacated the Board's report, and dismissed the disciplinary proceeding. On petition of the Board and Bar Counsel for rehearing, the court of appeals, *en banc*, upheld the Board's report and imposed a public censure based upon the Board's finding of professional misconduct (Pet. App. 1a).[4] The present petition for writ of certiorari followed.

ARGUMENT

1. The Court previously has had occasion to note that each State

> "has an extremely important interest in maintaining and assuring the professional conduct of the attorneys it licenses. . . . The judiciary as well as the public is dependent upon professionally ethical conduct of attorneys and thus has a significant interest in assuring and maintaining high standards of conduct of attorneys engaged in practice." *Middlesex Ethics Comm. v. Garden State Bar Ass'n,* 457 U.S. 423, 434 (1982). *Accord*: *Florida Bar v. Went For It, Inc.,* 515 U.S. 618 (1995); *Ohralik v. Ohio Bar Ass'n*, 436 U.S. 447, 460 (1978); *Goldfarb v. Virginia Bar*, 421 U.S. 773, 792 (1975).

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[4] The five judges of the court of appeals who composed the majority were unable to agree among themselves concerning the proper sanction. Three judges would have imposed a six-month suspension; one judge, a one-year suspension; and one judge, a censure. The five judges acquiesced in the censure as the least common sanction that would command a majority and permit disposition of the proceeding (Pet. App. 49-50a).

The court of appeals below is empowered by Congress to "make such rules as it deems proper respecting the examination, qualification, and admission of persons to membership in its bar, and their censure, suspension, and expulsion." D.C. Code § 11-2501(a). Pursuant to that authority, the court has promulgated rules of professional conduct, applicable to members of the District of Columbia Bar, including Mr. Abrams. D.C. App. R. X (promulgating former Code and present Rules).

The rule of professional conduct at issue here -- DR 1-102(A)(4) -- sets forth a core requirement of honesty that constitutes a longstanding provision of the Model Code of Professional Responsibility. The rule properly extends beyond purely professional activity in order "to protect the public . . . by withholding the trust placed in members of the profession from those whose conduct evidences characteristics of dishonesty, faithlessness, or other inability to exercise fiduciary responsibilities." Donald T. Weckstein, "*Maintaining the Integrity and Competence of the Legal Profession*," 48 Tex. L. Rev. 267, 275 (1970).

2. The court of appeals correctly determined that Mr. Abrams' presidential pardon did not displace the Court's settled authority to impose discipline on the basis of Mr. Abrams' professional misconduct. The effect of the pardon, the court held, was to bar the imposition of punishment in respect of Mr. Abrams' criminal offense. The court properly concluded that the pardon did not foreclose a prospective assessment of Mr. Abrams' continued fitness to hold out as a licensee of the court and as a member in good standing of the Bar, based upon the proof of his professional misconduct.

(a) As recently as *Nixon v. United States*, 506 U.S. 224, 232 (1993), this Court has said that "the granting of a pardon . . . is [a]n executive action that mitigates or sets aside *punishment* for a crime." *"Id.* at 232 (emphasis in original). The imposition of professional discipline does not constitute punishment, whether as a matter of constitutional law or as a component of attorney ethics. In *Ex parte Wall,* 107 U.S. 265, 273 (1882), the

Court, quoting Lord Mansfield, characterized attorney discipline as "not by way of punishment, but . . . the exercise [of] . . . discretion, whether a [person] whom [the courts] . . . have formerly admitted is a proper person to be continued on the roll or not." The court below affirmed its precedents that the "purpose in conducting disciplinary proceedings and imposing sanctions is not to punish the attorney; rather, it is to offer the desired protection by assuring the continued or restored fitness of an attorney to practice law." 689 A.2d at 12 (Pet. App. 16a), citing *In re Steele,* 630 A.2d 196, 200 (D.C. 1993) (footnote and citation omitted). *See also, e.g., In re Temple*, 629 A.2d 1203, 1209 (D.C. 1993); *In re Reback*, 513 A.2d 226, 231 (D.C. 1986) (en banc); *In re Hutchinson*, 534 A.2d 919, 924 (D.C. 1987) (en banc).[5]

(b) The court of appeals properly distinguished Mr. Abrams' criminal conviction from his underlying misconduct. The disciplinary charges filed by the Bar Counsel before the Board on Professional Responsibility rested on the fact of Mr. Abrams' professional misconduct -- his repeated acts of dishonesty before three Committees of Congress -- and the consequent violations of the Disciplinary Rule prohibiting such misconduct.[6]

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[5] A contrary holding by this Court would have grave consequences under the double jeopardy clause for the settled practice whereby disciplining courts throughout the country routinely impose discipline upon attorneys convicted of crimes. *See Hudson v. United States*, 92 F.3d 1026 (10th Cir. 1996), *cert. granted*, 65 U.S.L.W. 3684 (U.S. April 14, 1997) (No. 96-976).

[6] To be sure, Mr. Abrams' conviction was relevant to the disciplinary proceeding in that the conviction triggered the disciplinary investigation that led to the Bar Counsel's ethical charges, Mr. Abrams' plea of guilty constituted an admission of the charges in the criminal information filed against him by the Independent Counsel, and, by operation of Rule XI, §10(f) of the court of appeals' Rules Governing the Bar, the judgment of conviction conclusively established his commission of the crime. However, the proofs at hearing--consisting of the transcripts of Mr. Abrams' congressional testimony, the information, plea, and judgment of conviction from the criminal proceeding, and Mr. Abrams' own testimony,

The court of appeals properly distinguished *Ex parte Garland*, 71 U.S. (4 Wall.) 333 (1866), the case principally relied upon by Mr. Abrams. 689 A.2d at 16-18 (Pet. App. 27-33a). There the Reconstruction Congress sought to visit collective punishment upon Garland and others who, like him, had served as officers of the Confederacy or had lent support to its cause. Congress, by legislation, purported to strip such persons of their right to appear as counsel before this Court. President Johnson's pardon operated to "release [Garland's] . . . punishment and blots . . . out of existence the guilt, so that in the eye of the law the offender is as innocent as if he had never committed the offence." 71 U.S. at 380-81. The pardon thereby foreclosed the imposition of the "punishment" sought to be visited upon Garland in respect of his retroactively declared "offence" against the United States. Here, by contrast, the court's imposition of discipline, which prospectively protects the public interest in the ongoing integrity of the Bar, does not constitute "punishment" in either a constitutional or a disciplinary sense, and the basis of the court's action is the underlying professional misconduct rather than the bald fact of conviction of a criminal offense.

None of the other post-Civil War decisions of the Court invoked by Mr. Abrams before the court of appeals and in his petition for a writ of certiorari approaches the circumstances presented below, in which the highest court of the jurisdiction imposed professional discipline pursuant to its undoubted authority to regulate the membership of its bar. Rather, those post-Civil War cases involved the efforts of former Confederate supporters or sympathizers pardoned by President Johnson to recover properties seized by the Union forces in the war or the proceeds of sale. The Court reiterated in each of the cases that the pardon had removed the "penal consequences" of the underlying "offence," thereby confirming both the punitive nature of the predicate disability and the limited scope of the presidential act. *Knote v. United*

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provided free-standing evidence of the commission of the ethical misconduct proscribed by DR 1-102(A)(4).

States, 95 U.S. 149, 153 (1877); *Osborn v. United States*, 91 U.S. 474, 477 (1875); *Carlisle v. United States*, 83 U.S. 147, 153 (1872); *United States v. Klein*, 80 U.S. 128, 147 (1871).

In *Carlesi v. New York*, 233 U.S. 51 (1914), the Court, without suggesting that it had departed from *Garland*, ruled that a state court lawfully could enhance the criminal sentence imposed under a multiple-offender statute even where the defendant's predicate conviction had been the subject of a presidential pardon. Whatever the merits of the holding in *Carlesi*, the Court's reasoning -- that the heightened sentence did not impose punishment for the pardoned earlier offense so as to run afoul of the presidential pardon -- forecloses Mr. Abrams' argument that the court below somehow infringed upon the immunity conferred on him by his pardon.

3. The Department of Justice recently opined that the presidential pardon does not foreclose the imposition of professional discipline. In 1995 the Assistant Attorney General for the Office of Legal Counsel wrote:

> "There may be instances where an individual's conduct constitutes not only a federal offense, but also a violation of a separate code of conduct or ethics that the individual is obligated to comply with by virtue of his or her professional license. Discipline associated with the breach of the conditions of a professional license, where the disciplinary action is not triggered merely by the fact of commission or conviction of a federal offense, generally would not be barred by a pardon." 689 A.2d at 16 (Pet. App. 27-28a).

In so writing, the Assistant Attorney General followed a settled line of Departmental opinions, some dating back to the turn of the century.[7]

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[7] *See Op. Att'y Gen.* No. 78-84, reprinted in 2 Op. O.L.C. 370 (1997) ("while a pardon relieves the offender of all disabilities imposed by way of punishment, it does not relieve an offender of disabilities that attend a conviction"); "Effect of Pardon on Statute Making Persons Convicted of

4. The court of appeals, in rejecting Mr. Abrams' invocation of the pardon, hypothesized the case of an alcoholic surgeon who botches a surgery, is convicted of manslaughter and subsequently is pardoned. 689 A.2d at 10-11 (Pet. App. 13a). "The proposition that the alcoholic but pardoned surgeon . . . cannot be disciplined," said the court, "is, in our view, altogether unacceptable and even irrational . . ." *"Id.* at 11(Pet. App. 13a). Mr. Abrams' principal rejoinder is that the surgeon's alcoholism is the product of a "disabling condition or status that exists, and can be demonstrated, wholly apart from the surgeon's . . . involvement in the specific conduct constituting the pardoned offense." Pet. 29. Whether or not the hypothesized surgeon's alcoholism would be the proper subject of professional discipline wholly divorced from his professional misconduct, Mr. Abrams' position appears to be that, by virtue of the presidential pardon, the court below somehow was disabled to take cognizance of his professional shortcomings -- in specific, his propensity to deal in falsehoods on matters of grave public importance -- because his ethical misconduct had occurred in circumstances that also gave rise to criminal consequences and the subsequent pardon. Mr. Abrams' view of the limited scope of regulation of the bar, if adopted by the Court, would stand the concept of professional discipline on its head, permitting the imposition of ethical sanctions in the absence

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Felonies Ineligible for Enlistment in the Army," 39 Op. Att'y Gen. 132 (1938) ("whilst the President's pardon restores the criminal to his legal rights and fully relieves him of the disabilities legally attaching to his conviction, it does not destroy an existing fact, viz, that his service was not honest and faithful"); "Offenses Committed under Section 504," 30 Op. Att'y Gen. 193 (1930) (pardon remits penalties consequent upon comission of offense, including forfeiture of statutory benefits); "Pardon -- Removal of Disabilities -- Pension," 27 Op. Att'y Gen. 178 (1909) (pardon does not operate to undo separation from service so as to create fiction of honorable discharge entitling former serviceman to federal pension).

of specific instances of misconduct giving rise to criminal liability but not in their presence.[8]

5. The court of appeals assumed, but did not decide, that Mr. Abrams properly had preserved his challenge to the disciplinary proceeding notwithstanding his affirmative representation before the Board on Professional Responsibility that the pardon did not foreclose the imposition of professional discipline. 689 A.2d at 10 (Pet. App. 10-11a). In the Bar Counsel's view, expressed to the court below when it requested supplemental briefing on this issue, Mr. Abrams properly could invoke the pardon before the court -- if, as he contended, the pardon ousted the court of jurisdiction to entertain a disciplinary proceeding against him. However, we acknowledged that under *Burdick v. United States*, 236 U.S. 79 (1915), the recipient of a presidential pardon may accept or reject it, as he chooses. If *Burdick* applies to one who embraces his pardon (as does Mr. Abrams here) as well as to one who repudiates it (as did Burdick), Mr. Abrams likely failed to preserve his claim for appellate review, and the lower court's decision not to rest its adoption of the Board's recommendation of discipline upon the alternate procedural ground of waiver does not bind this Court to consider Mr. Abrams' petition on the merits. 689 A.2d at 10 (Pet. App.11a).

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[8] Mr. Abrams' further argument that in all likelihood the president would not grant a full and unconditional pardon to the alcoholic surgeon, but only a limited and incomplete pardon, does not address either the hypothetical question posed by the court below or the pardon that Mr. Abrams in fact received.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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STATUTES AND RULES

District of Columbia Code, Sec. 11-2501:

> "The District of Columbia Court of Appeals shall make such rules as it deems proper respecting the examination, qualification, and admission of persons to membership in its bar, and their censure, suspension, and expulsion." (July 29, 1970, 84 Stat. 521, Pub. L. 91-358, title I, Sec. 111; 1973 Ed., Sec. 11-2501.)

District of Columbia Court of Appeals Rule X Governing the Bar:

> "The District of Columbia Rules of Professional Conduct and any amendments thereto, appearing as Appendix A, shall provide the standards governing the practice of law in the District of Columbia. Appendix B of this rule sets forth the requirements and provisions of the Interest on Lawyers Trust Account (IOLTA) program which has been approved by the court."

District of Columbia Court of Appeals Rule XI Governing the Bar, Sec. 3:

> "(a) Any of the following sanctions may be imposed on an attorney for a disciplinary violation: . . . (3) Censure by the Court . . . ."

District of Columbia Code of Professional Responsibility, Disciplinary Rule 1-102(A)(4):

> "A lawyer shall not . . . engage in conduct involving dishonesty, fraud, deceit, or misrepresentation."